

Vol. 1912

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

MERCHANTS PACKING CO., a corporation,
Appellant,

vs.

NAT ROGAN, individually and as Collector of Internal Revenue for the Sixth District of California, E. H. COHEE, individually and as acting Collector of Internal Revenue for the Sixth District of California, and GUY T. HELVERING, Commissioner of Internal Revenue,

Appellees.


Transcript of Record.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

FILED

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PAUL F. O'BRIEN,



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italics; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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Names and Addresses of Solicitors.

For Appellant:

CLAUDE I. PARKER, Esq.,
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Bank of America Building,

Los Angeles, California.

For Appellees:

PEIRSON M. HALL, Esq.,
United States Attorney,

CLYDE THOMAS,

Assistant United States Attorney,
Federal Building,

Los Angeles, California

United States of America, ss.

To Nat Rogan, Individually and as Collector of Internal Revenue for the Sixth District of California, Defendant and Peirson M. Hall, U. S. Attorney for the Southern District of California and Clyde Thomas, Assistant U. S. Attorney for the Southern District of California, his Solicitor and Counsel, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 12th day of October, A. D. 1935, pursuant to an Order allowing an Appeal filed and entered on the 7th day of Sept., 1935, in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain Suit, being Equity, No. 702-J, Merchants Packing Company, a corporation, plaintiff and you are defendant and appellee to show cause, if any there be, why the Order vacating the temporary injunction rendered against the plaintiff and appellant as in the said Order Allowing Appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable PAUL J. McCORMICK, United States District Judge for the Southern District of California, this 13th day of September, A. D. 1935, and of the Independence of the United States, the one hundred and sixtieth.

Paul J. McCormick

U. S. District Judge for the Southern District of California.

[Endorsed]: Received copy of within this 13th day of Sept. 1935 Clyde Thomas, Asst. U. S. Atty. atty for defendants. Filed Sep. 13, 1935. R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED
STATES IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA
CENTRAL DIVISION

MERCHANTS PACKING CO.,)	
a corporation,)	
)	
Plaintiff,)	
)	
vs.)	
)	
NAT ROGAN, INDIVIDUALLY	)	In Equity
AND AS COLLECTOR OF IN-	)	No. 702 J
TERNAL REVENUE FOR THE)	
SIXTH DISTRICT OF CALI-	)	BILL OF
FORNIA, E. H. COHEE, INDI-	)	COMPLAINT
VIDUALLY AND AS ACTING	)	IN
COLLECTOR OF INTERNAL	)	INJUNCTION
REVENUE FOR THE SIXTH)	
DISTRICT OF CALIFORNIA,)	
and GUY T. HELVERING, COM-)	
MISSIONER OF INTERNAL)	
REVENUE,)	
)	
Defendants.)	
<hr style="width: 50%; margin-left: 0;"/>)	

Comes now the plaintiff and complains of the defendants and alleges:

I.

That plaintiff now is and has been at all times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of California, with its principal place of business located in Los Angeles.

California, and is a resident of the Southern District of California, Central Division.

II.

That the defendant, NAT ROGAN, is the duly appointed, qualified and acting Collector of Internal Revenue for the Sixth District of California and is a resident of the Southern District of California, Central Division and the Sixth Revenue District of California and of the County of Los Angeles, State of California.

That the defendant, E. H. COHEE, is the duly designated acting Collector of Internal Revenue for the Sixth District of California and is a resident of the Southern District of California, Central Division and the Sixth Revenue District of California and of the County of Los Angeles, State of California.

That the defendant, GUY T. HELVERING, is the duly appointed, qualified and acting Commissioner of Internal Revenue and a resident of Washington, D. C.

III.

That plaintiff is engaged in the business of buying, at its plant in Los Angeles, California, hogs, cattle and other live stock, slaughtering the same and converting and packing same into food products and selling said food products so converted and packed in its trade territory, which trade territory is wholly within the State of California. That all of its purchases, all of its sales, and all of its business is transacted within the State of California and that it is not engaged in any interstate commerce or business either directly or indirectly nor does any of plaintiff's business affect interstate commerce either directly or indirectly.

IV.

That this is an action brought to enjoin the assessment of certain so-called processing taxes about to be assessed against the plaintiff by the defendant GUY T. HELVERING, as Commissioner of Internal Revenue, and the collection of said taxes after assessment, all as provided in that certain act known as the Agricultural Adjustment Act of May 12, 1933, adopted by the Congress of the United States, all as more particularly hereinafter alleged.

V.

That on or about the 12th day of May, 1933, the Congress of the United States adopted an act known as the Agricultural Adjustment Act of May 12, 1933, and that said act was thereafter amended on April 7, 1934, May 9, 1934, June 19, 1934, and June 26, 1934, said act being Title 1, Chapter 25, Act of May 12, 1933; U. S. C. A. Title 7, Chapter 26, Sections 601 to 619, inclusive.

VI.

That under and by virtue of the terms of said Agricultural Adjustment Act the declared policy of Congress as shown by Section 2 thereof is as follows:

"1. To establish and maintain such balance between the production and consumption of agricultural commodities and such marketing conditions therefor as will reestablish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farms buy equivalent to the purchasing power of agricultural commodities in the base period. The base period in the case of all agricultural commodities except tobacco shall be the pre-war period of August, 1909-July, 1914. * * *

2. To approach such equality of purchasing power by gradual correction of the present inequalities therein at as rapid a rate as is deemed feasible in view of the current consumption demands in domestic and foreign markets.

3. To protect the consumer's interest by readjusting farm production at such level as will not increase the percentage of the consumer's retail expenditures for agricultural commodities or products derived therefrom which is returned to the farmer above the percentage which was returned to the farmer in the pre-war period, August, 1919-July, 1914."

VII.

That said Agricultural Adjustment Act further provides that processing taxes are to be levied, assessed, and collected on the first domestic processing of the commodity and are required to be paid by the processor. That the plaintiff is a processor of hogs and as hereinafter alleged has been required to pay a monthly processing tax fixed by the Secretary of Agriculture with respect to hogs slaughtered by it, and is now threatened with the payment of additional monthly processing taxes so fixed by the Secretary of Agriculture with respect to hogs slaughtered by it.

VIII.

That under and by virtue of the terms of said Agricultural Adjustment Act and the amendments thereto power is attempted to be conferred upon the Secretary of Agriculture—

(a) To agree with producers upon reduction in acreage or reduction in production of any basic agricultural commodity.

(b) To provide rental or benefit payments in connection therewith "in such amounts as the Secretary deems fair and reasonable".

(c) To enter into marketing agreements with processors, association of producers, and others.

(d) To put into effect processing taxes at rates determined and altered by him from time to time but only when the Secretary has first made a determination that rental or benefit payments are to be made with respect to any basic agricultural commodity.

(e) To make regulations to carry out his powers and a penalty for the violation of such regulations is prescribed in the sum of not over \$100.00.

(f) To make exemptions from processing taxes when, in the Secretary's judgment, processing taxes are unnecessary to effectuate the declared policy of the Act.

(g) To add to the list of basic agricultural commodities provided in said Act such additional agricultural commodities as the Secretary may determine to be in competition with the commodities set forth in said Act at such time or times as the said Secretary shall determine that the payment of the processing tax upon any basic agricultural commodity is causing or will cause to the processors thereof disadvantages in competition from competing commodities by reason of excessive shifts in consumption between such commodities or products thereof.

IX.

That said Agricultural Adjustment Act further provides that in determining the amount of processing tax to be assessed against any such processor the tax shall be

at such rate "as equals the difference between the current average farm price for the commodity and the fair exchange value of the commodity; except that (1) if the Secretary has reason to believe that the tax at such rate on the processing of the commodity generally or for any particular use or uses will cause such reduction in the quantity of the commodity or products thereof domestically consumed as to result in the accumulation of surplus stocks in the commodity products thereof or in the depression of the farm price of the commodity, then he shall cause an appropriate investigation to be made and afford due notice and opportunity for hearing to interested parties and if thereupon the Secretary finds that any such result will occur, then the processing tax or the processing of the commodity generally or for any designated use or uses or as to any designated product or products thereof for any designated use or uses shall be at such rate as will prevent such accumulation of surplus stocks and depression of the farm price of the commodity. * * *"

"(c) For the purposes of Part 2 of this title, the fair exchange value of a commodity shall be the price therefor that will give the commodity the same purchasing power with respect to articles farmers buy as such commodity had during the base period specified in Section 2 (August, 1909-July, 1914); and the current average farm price and the fair exchange value shall be ascertained by the Secretary of Agriculture from available statistics of the Department of Agriculture."

Said Agricultural Adjustment Act further provides, in Section 12 (b), that in addition to the specific sums appropriated by Congress to carry out said act that the

proceeds derived from the taxes imposed under said Act are thereby appropriated to be available to the Secretary of Agriculture "for expansion of markets and removal of surplus agricultural products and the following purposes under Part 2 of this title: administrative expenses, rental and benefit payments and refunds on taxes".

That said Act further provides that among other things hogs are a basic agricultural commodity.

X.

That acting under said Agricultural Adjustment Act the Secretary of Agriculture has made the following determinations and entered the following orders fixing the amount of processing taxes, to wit:

(a) As of August 17, 1933 he proclaimed that benefit payments were to be made with respect to hogs, as basic agricultural commodity.

(b) That he determined from statistics of the Department of Agriculture that the difference between the current average farm price of hogs for the base period, August, 1909-July, 1914, and the fair exchange value of hogs as of November 5, 1933 was \$4.21 per hundred pounds live weight.

(c) That he held a hearing in Washington on September 5, 1933 and after said hearing determined that the imposition of a processing tax of \$4.21 per hundred pounds live weight would result in an accumulation of surplus stocks of hogs or the products thereof or the depression of the farm price of hogs, and determined that the following rates of processing tax would prevent such results: 50 cents per hundred pounds live weight effective as of November 6, 1933; \$1.00 per hundred pounds

live weight effective as of December 1, 1933; \$1.50 per hundred pounds live weight effective as of January 1, 1934; \$2.00 per hundred pounds live weight effective as of February 1, 1934. That thereafter and with the approval of the President, the said Secretary of Agriculture made a determination as of December 21, 1933 wherein and whereby the rate of the processing tax on the first domestic processing of hogs as of January 1, 1934 shall be \$1.00 per hundred pounds live weight; as of February 1, 1934, \$1.50 per hundred pounds live weight; as of March 1, 1934 \$2.25 per hundred pounds live weight, which said rate of \$2.25 per hundred pounds live weight is now and ever since the said March 1, 1934 has been in full force and effect.

XI.

That there has been levied and assessed against the plaintiff herein as a first domestic processor of hogs, under the terms of said Agricultural Adjustment Act and the administrative orders of the Secretary of Agriculture on all hogs slaughtered by plaintiff, and that plaintiff has paid on account of such processing tax to the Collector of Internal Revenue for the Sixth Internal Revenue District of California the total sum of \$81,803.96 on account of hogs processed and slaughtered by it. That so long as said Agricultural Adjustment Act is enforced there will be levied and assessed against the plaintiff processing taxes based upon its average monthly slaughter of hogs, if the tax is continued, at the rate of \$2.25 per hundred pounds live weight of the approximate average monthly amount of \$5,000.00. That the failure of the plaintiff to pay said processing taxes as and when due

will result in the imposition of the following penalties against it:

(a) A penalty of interest at the rate of one per cent (1%) per month from the due date of each monthly installment of said tax.

(b) A penalty of five per cent (5%) of the total amount of the tax on the failure of the plaintiff to pay within ten days after demand by the Collector of Internal Revenue, said penalty being added to the amount of the tax and the total tax and penalty thereafter drawing interest at the rate of one per cent (1%) per month.

(c) After a second ten-day notice, the Government is authorized under the provisions of the applicable law, if the tax is not paid, to file liens against any and all of plaintiff's property and to distrain the plaintiff's property, including its plant, inventory, cash on hand, and other assets, for the purpose of realizing the amount of the tax and penalties.

XII.

That the said Agricultural Adjustment Act, in so far as it authorizes the imposition, levy, assessment and collection of processing taxes against the plaintiff, is void, invalid and beyond the powers granted to Congress by the Constitution of the United States and violates the provisions of the Constitution of the United States in the following parts:

1st: The Agricultural Adjustment Act violates the Fifth Amendment to the Constitution of the United States in that it takes the plaintiff's property without due process of law, for the reason that the processing tax goes into effect only when and in the event that the Secretary of

Agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity and ceases at the end of the marketing year current at the time the Secretary proclaims that rental or benefit payments are to be discontinued with respect to such commodity. That the so-called processing tax is therefore not a tax at all but is in effect the taking of property of the plaintiff and other processors for the benefit of another class of citizens.

2nd: That the said Agricultural Adjustment Act violates the Tenth Amendment of the Constitution of the United States in that it is not adopted in pursuance of any power expressly or directly granted to the Congress by the Constitution of the United States and that the matters in said Act attempted to be regulated are not matters which come within the purview of any power so delegated to Congress by the Constitution of the United States and is therefore reserved to the States respectively or to the people. That the declared policy of the Act shows that the matters therein attempted to be regulated and the results to be obtained are matters which are within the exclusive jurisdiction of the States or the people and not within the jurisdiction of the Congress of the United States.

3rd: That the Agricultural Adjustment Act violates Article 1, Section 8, of the Constitution of the United States in that it is not a tax or a duty or an imposition or an excise as therein contemplated, for the reason that the so-called processing tax is not a tax for the benefit of the Government but is an arbitrary exaction from plaintiff and other processors for the benefit of certain farmers and producers and is to be assessed and collected only

where it is found and determined by the Secretary of Agriculture that a necessity exists for the payment of rental or other benefits to such farmers or producers.

4th: That the powers attempted to be granted by the Congress of the United States to the Secretary of Agriculture by the said Agriculture Adjustment Act are legislative functions to be exercised by the Congress of the United States alone. That such legislative functions and power can not be delegated by the Congress to the Secretary of Agriculture or any one else. That specifically said Agricultural Adjustment Act attempts to delegate to the Secretary of Agriculture the power to determine and fix the rate of the processing tax and the necessity therefor when such processing tax shall cease to be levied and collected, what agricultural commodities shall be subject to the tax and who shall pay the same. That there is no formula or standard set up by the Congress according to which the Secretary of Agriculture shall act for the reason that the formula or standard therein attempted to be prescribed is uncertain, indefinite, and the factors upon which such determination are to be based are variable and impossible of exact or definite ascertainment. That the method of computation of said tax is indefinite and vague and the amount of the tax provided for is incapable of specific determination under the terms of said act; that there is no definition of the essential terms the determination of which the Secretary of Agriculture is to make in calling the said processing tax into being and fixing the rate thereof and for the further reason

that the attempted standard or formula, that is to say, that level which equals the difference between the current average farm price for the commodity and the fair exchange of value of the commodity, is destroyed by the exception that follows such formula or standard as provided in Section 9 (b) of said Act.

5th: That by the terms of said Agricultural Adjustment Act said Act is only to affect persons engaged in interstate commerce or whose business affects interstate commerce directly or indirectly and that plaintiff is not one of the persons therein contemplated to be liable for the processing tax, for the reason as aforesaid that plaintiff's business is entirely intra-state and none of it is interstate. That Congress has no power or authority to regulate intra-state business.

6th: That the said Agricultural Adjustment Act is not being carried out as provided in its terms as said Secretary of Agriculture should carry it out, for the reason that the rate fixed by said Secretary of Agriculture for the months of January, February, March, April, and May, 1935, at the rate of \$2.25 per hundred pounds live weight for hogs is invalid and void for the reason that said rate has been fixed and established by the Secretary of Agriculture in complete disregard to the so-called formula prescribed by said Agriculture Adjustment Act for the establishing of such rate. As calculated and determined from the statistics of the Department of Agriculture the fair exchange value of pre-war parity farm price for hogs, the actual farm price for hogs, and the

excess of pre-war parity over the actual price for hogs for said months hereinabove enumerated are as follows:

1935	Fair exchange value or pre-war parity farm price for hogs.	Actual farm price for hogs.	Excess of pre-war parity of farm over actual prices.
Jan.	\$9.10	\$6.87	\$2.23
Feb.	9.17	7.10	2.07
Mar.	9.24	8.10	1.14
Apr.	9.24	7.88	1.36
May	9.24	7.92	1.32

That the above set out figures show that there is no basis on which a processing tax at the rate of \$2.25 per hundred pounds live weight of hogs can be levied or collected. That the action of the Secretary of Agriculture in establishing the rate of \$2.25 per hundred pounds live weight is without foundation and against fact and is not justified by the Act even if it were valid. That said action of the Secretary of Agriculture will be continued in the future and that plaintiff will be required to pay large sums of money as processing taxes which are wholly unnecessary, in order to bring the purchasing power with respect to articles which farmers buy to the level of such purchasing power in the base period. That the action of the Secretary of Agriculture in this respect is unwarranted, arbitrary and contrary to the so-called formula or standard set out by said Act and adopted by the Secretary of Agriculture for the levying of such processing taxes on hogs.

XIII.

That there is about to be assessed against plaintiff herein a processing tax in the sum of \$2,934.16 for the month of May, 1935, and a sum of money at this time

not known to plaintiff for the month of June, 1935, and for all of the months subsequent thereto during which time the Agricultural Adjustment Act shall remain in force. That upon the assessment thereof plaintiff will become liable for the payment thereof and will be forced to pay the same to the defendant, E. H. COHEE, as acting Collector of Internal Revenue for the Sixth District of California, and to NAT ROGAN, as Collector of Internal Revenue for the Sixth District of California, or to either of them. That unless the defendant, GUY T. HEVERING, as Commissioner of Internal Revenue, is enjoined from the assessing of said taxes about to be assessed or hereafter to be assessed, and unless the defendant, E. H. Cohee, individually and as acting Collector of Internal Revenue for the Sixth District of California, and Nat Rogan, individually and as Collector of Internal Revenue for the Sixth District of California, is enjoined from collecting such taxes, plaintiff will have to pay the same and in the event of nonpayment, be subject to the penalties hereinabove set forth.

XIV.

That plaintiff seeks the relief herein prayed for in equity for the reason that plaintiff has no speedy or adequate remedy at law for the reason that plaintiff can not file a claim for refund after payment of taxes and in the event of the rejection thereof file suit for the return of such taxes, for the reason that a judgment obtained thereon would be of no force or effect because the Congress of the United States has made no appropriation for the payment of any such refunds. That although the Act as it now stands provides that refund shall be paid out of

the taxes as collected, plaintiff is informed and believes and therefore alleges that the amounts expended by the Secretary of Agriculture far exceeds the amounts appropriated by the Congress for the carrying out of said Act and the amount of taxes collected by reason of said processing taxes, so that the said Secretary of Agriculture or the Treasurer of the United States have no funds out of which to pay such refunds in the event plaintiff should obtain a judgment for the refund of the taxes paid.

That further plaintiff is informed and believes and therefore alleges that there is now pending in the Congress of the United States an act to amend the Agricultural Adjustment Act wherein it will be provided that no claim for refund shall be filed for any of the processing taxes theretofore paid nor shall any suit be maintained for the return or refund of any such taxes theretofore paid.

That plaintiff is informed and believes and therefore alleges that should he pay said tax at this time there would be no remedy at law available for him and therefore no adequate remedy at law to obtain the return or refund of said taxes theretofore paid. That plaintiff is further informed and believes and therefore alleges that the defendants and none of them could respond to a judgment obtained by plaintiff against them for the wrongful collection of the taxes herein sought to be enjoined, in the event this Act would thereafter be declared unconstitutional or void.

That plaintiff is informed and believes and therefore alleges that unless the defendants are restrained from the assessment and collection of the taxes herein set forth the said defendants will file or cause to be filed liens

against the property of plaintiff which will, in the very nature of said liens be a restraint upon plaintiff's right to deal in and with its property as freely as it could have dealt therewith before the filing of any such liens and will wholly destroy the value of plaintiff's property and plaintiff's business. That said liens will attach to the inventory of plaintiff so that plaintiff from the date of the filing of said lien will be unable to sell any of its inventory, including its hogs, and by-products thereof and food products made therefrom. That plaintiff is further informed and believes and therefore alleges that unless the defendants are restrained from the collection of said taxes said defendants will have the right to and will attempt to collect said taxes by distraint and by seizing the property of plaintiff. That the filing of any such liens or the distraint and seizure of plaintiff's property will involve repeated and continuous acts of trespass upon the property of said plaintiff by said defendants and defendants will employ numerous agents and servants to perform said acts of trespass. That as a result of any such distraint and seizure of the property of plaintiff herein there will be repeated breaches of peace if defendants are permitted the right to collect such taxes by such methods or any or either of them. That the defendants nor any of them have a financial responsibility near equal to the value of plaintiff's property or the damages which plaintiff will suffer by reason of the attempt to collect said taxes by the defendants, and if the defendants are permitted to continue and not be restrained from continuing their attempt

to collect said taxes plaintiff will suffer irreparable damage and the defendants will be unable to respond to plaintiff in damages. That plaintiff will have no way nor manner within which to recoup its losses or damages. That unless the said defendants are restrained as herein prayed for there will be a multiplicity of suits all of which can be avoided by the granting by this Court of an injunction enjoining the defendants or any or either of them or their servants or agents from doing or attempting to do any of the acts herein sought to be enjoined.

XV.

That no issue of fact will or can be tendered by defendants. That it affirmatively appears from the said Agricultural Adjustment Act of May 12, 1933 that said Act is unconstitutional and void and that the plaintiff herein is therefore not liable for the payment of any of the said taxes herein sought to be enjoined.

WHEREFORE, plaintiff prays that the defendant GUY T. HELVERING, as Commissioner of Internal Revenue, be enjoined and restrained from assessing any processing taxes against this plaintiff and that the defendants E. H. COHEE, individually and as acting Collector of Internal Revenue for the Sixth District of California, and NAT ROGAN, individually and as Collector of Internal Revenue for the Sixth District of California, be enjoined and restrained from collecting or attempting to collect any of the said processing taxes, whether by distraint, levy, action at law or in equity or otherwise, and that the said defendants be restrained from filing a lien against plaintiff's property by reason of said taxes and that the said defendants be restrained from distraining or seizing plaintiff's property in an attempt to enforce the

payment of said taxes. That the defendants be enjoined and restrained from possessing themselves of plaintiff's property or any of it. That this Honorable Court issue its preliminary injunction upon the filing of plaintiff's complaint herein and that a time be set for the hearing thereon and that at such trial said preliminary injunction be made permanent, forever enjoining and restraining said defendants, their officers, servants, agents, solicitors, attorneys, or successors in office, or any or either of them, from assessing the said tax herein complained of or from collecting or attempting to collect said taxes or any part thereof or from filing any liens against plaintiff's property by reason thereof or from distraining and seizing plaintiff's property, or in any way disturbing the quiet and peaceful possession of plaintiff in the free use of its property. That an Order to Show Cause be made herein and served upon the said defendants, requiring them to show cause at a date certain why they should not be permanently restrained and enjoined from committing the acts, or any of them, herein complained of, and that a subpoena be directed to said defendants to answer the premises and to stand to and abide by such order and decree.

That this Honorable Court do render its declaratory judgment herein, declaring the said Agricultural Adjustment Act of May 12, 1933 unconstitutional and void for the reasons stated in plaintiff's complaint herein, and that the said Court further declare that the administration of said Act by the Secretary of Agriculture is illegal, invalid and void for the reason that said Act is not being admin-

istered according to its terms and conditions as set forth in plaintiff's complaint, and for such other and further relief as to this Court may seem just and equitable in the premises.

CLAUDE I. PARKER AND
RALPH W. SMITH,

By Ralph W. Smith
Attorneys for Plaintiff.

State of California)
) ss.
County of Los Angeles)

MOSE FOORMAN, being by me first duly sworn, deposes and says: that he is the Secretary and Treasurer of the MERCHANTS PACKING CO., a corporation, the Plaintiff in the above entitled action; that he has read the foregoing Bill of Complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

[Seal] Mose Foorman

Subscribed and sworn to before me this 28th day of June, 1935.

[Seal] Marguerite Le Sage
Notary Public in and for the County of Los Angeles.
State of California

[Endorsed]: Filed Jul 3 1935 R. S. Zimmerman,
Clerk By L. Wayne Thomas Deputy Clerk

[TITLE OF COURT AND CAUSE.]

MOTION TO DISMISS

COME NOW Nat Rogan, individually and as Collector of Internal Revenue for the Sixth District of California, and E. M. Cohee, individually and as former Acting Collector of Internal Revenue for the Sixth District of California, defendants in the above-entitled cause, for themselves only and severing from any other defendants, by Peirson M. Hall, United States Attorney for the Southern District of California, and Clyde Thomas, Assistant United States Attorney for said District, their attorneys, and move the court to dismiss the Bill of Complaint filed herein with costs to be paid by the complainant, upon the following grounds and for the following reasons:

I

That the court is without jurisdiction to restrain or enjoin the collection of the taxes herein involved, or to hear or determine the issues presented by said Bill of Complaint because:

(1) Section 3224 of the Revised Statutes of the United States prohibits the maintaining in any court of a suit for the purpose of restraining the assessment or collection of a federal tax;

(2) The Bill of Complaint sets forth no facts which, if true, would entitle complainant to the relief prayed for in a court of equity;

(3) Complainant has a plain, adequate and complete remedy in the ordinary course at law.

II

That the United States of America is a real party in interest and it may not be sued without its consent.

III

That there is no actual controversy between complainant and these defendants, or between any parties, over which this court has jurisdiction within the purview of the Declaratory Judgment Act.

IV

That the Declaratory Judgment Act does not authorize a litigation of questions arising under the revenue laws or against the United States and, particularly, does not authorize its use as a means for obtaining injunctive relief.

V

That the proceeding attempted to be instituted by this Complaint is not authorized by the provisions of the Declaratory Judgment Act and cannot be maintained.

Peirson M. Hall

PEIRSON M. HALL,

United States Attorney,

Clyde Thomas

CLYDE THOMAS,

Asst. United States Attorney,

Attorneys for Defendants

NAT ROGAN and E. M. COHEE.

[Endorsed]: Received copy of the within motion to dismiss this 10 day of July 1935. Claude I. Parker Ralph W Smith By J. Everett Blum Attorney for Plaintiff

Filed Jul 10 1935. R. S. Zimmerman, Clerk. By L. Wayne Thomas Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

OBJECTIONS TO THE GRANTING OF A PRE-
LIMINARY INJUNCTION

COME NOW Nat Rogan, individually and as Collector of Internal Revenue for the Sixth District of California, and E. M. Cohee, individually and as former Acting Collector of Internal Revenue for the Sixth District of California, defendants in the above-entitled cause, for themselves only and severing from any other defendants, by Peirson M. Hall, United States Attorney for the Southern District of California, and Clyde Thomas, Assistant United States Attorney for said District, their attorneys, and in response to the Order to Show Cause why a preliminary injunction should not issue pendente lite as prayed for in said Bill of Complaint, allege:

I

That the defendants are, and each of them is, a duly appointed, qualified and acting officer of the Internal Revenue Department of the United States.

II

That the duties of said defendants are to collect taxes levied under the Internal Revenue Laws of the United States.

III

That the complaint in the above-entitled case seeks to enjoin defendants from collecting taxes levied under and by the Internal Revenue laws of the United States.

IV

Section 3224 Revised Statutes of the United States prohibits the maintaining in any court of a suit for the purpose of restraining the assessment or collection of a federal tax.

V

The Bill of Complaint sets forth no facts which, if true, would entitle plaintiff to an injunction.

VI

Complainant has a plain, adequate and complete remedy in the ordinary course at law.

Dated: This 10 day of July, 1935.

Peirson M. Hall
PEIRSON M. HALL,
United States Attorney,

Clyde Thomas
CLYDE THOMAS,
Asst. United States Attorney,
Attorneys for defendants
NAT ROGAN and E. M. COHEE.

[Endorsed]: Received copy of the within Objections to the Granting of a Preliminary Injunction this 10 day of July 1935, Claude I Parker Ralph W Smith By J. Everett Blum Attorney for Plaintiff

Filed Jul 10 1935 R. S. Zimmerman, Clerk By L. Wayne Thomas Deputy Clerk.

At a stated term, to wit: The February Term, A. D. 1935, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, California on Saturday the 27th day of July in the year of our Lord one thousand nine hundred and thirty-five.

Present:

The Honorable: WILLIAM P. JAMES, District Judge.

THE LUER PACKING COMPANY,)	
)	
	)	Plaintiff,
	)	No. Eq.-708-J
)	
vs.)	
)	
NAT ROGAN, Collector,)	
	)	Defendant.

Plaintiff brought this suit for an Injunction and for declaratory relief; Injunction is prayed for to restrain the defendant Collector from enforcing collection of the processing tax levied under the provisions of the Federal Agricultural Adjustment Act of May 12, 1933; it being asserted that the law violates provisions of the Constitution of the United States, particularly that legislative power possessed solely by the Congress is attempted to be delegated to the Secretary of Agriculture. A speedy and adequate remedy at law is alleged to be lacking. An order to show cause why a Temporary Injunction should not issue brought the defendant Collector into court. The Collector, represented by the United States Attorney, on

the return day, took no issue with the facts pleaded in plaintiff's verified petition but interposed a motion to dismiss the suit based upon the ground that under the provisions of Section 154, Title 26, U. S. C. no injunction may issue to prevent the collection of any tax. The application for temporary injunction was submitted for decision subject to the motion to dismiss. The Court now, having considered the matter, makes its decision and causes same to be entered on the minutes of the court, as follows: The rule is recognized as well established, that the provisions of Section 154 as noted, will prevent an Injunction issuing to restrain the collection of a tax unless, in addition to a showing of the probable invalidity of the law under which the right to collect same is claimed, there be shown special facts from which it appears that the remedy at law available to the taxpayer does not furnish speedy and adequate relief or that a multiplicity of suits will result which can be avoided through the use of the equitable action. The Court, from the facts alleged and admitted by the defendant for the purposes of the application for Temporary Injunction, concludes that there is grave doubt as to the constitutionality of the act in question, which appears from an examination of its terms and provisions as well as by the fact that it has been already held invalid by the Circuit Court of Appeals for the First Circuit, and the United States District Court for the District of Minnesota, upon reasoning similar to that found in recent decisions of the Supreme Court of the United States. The Court also concludes that the facts alleged show unusual and exceptional conditions warranting the issuance of an Injunction, exclusive of any consideration of the fact that Congressional action is threat-

ened which may deprive plaintiff of any right of action at law, as to which allegation of fact it is believed the Court can give small weight because of its speculative and conjectural character. It is concluded that because of the serious doubt as to the constitutionality of the law, together with the fact that a multiplicity of suits must inevitably result, (necessary to be brought by plaintiff if it is relegated to its remedy at law to protect its rights,) Injunction should issue, as was held proper under similar findings in Lee v. Bickell, 292 U. S. 415-421. Separately considered, declaratory relief may be awarded as was decided by Judge Tuttle in the District Court of Michigan in Black v. Little, 8 Fed. Supp. 867, wherein he cites applicable reasoning in Nashville, C. & St. L. Ry v. Wallace, 288 U. S. 249. Preliminary Injunction will issue as prayed for, provided plaintiff furnish security to the defendant by undertaking with sufficient sureties in the sum of \$75,000.00 that it will pay all taxes chargeable on the account referred to, together with all costs assessed by the court in the event it is finally decided that Injunction was improperly issued or this action is dismissed. In lieu of an undertaking, plaintiff shall have the option to deposit the amount fixed in money with the Clerk of the Court, subject to like conditions. The court reserves the right to require added security to be given from time to time as may seem necessary to protect the defendant, or to modify the aforesaid order in any part or particular after notice to the parties. The motion of defendant to dismiss is denied. Defendant is allowed 15 days after notice hereof within which to answer the bill of complaint. An exception is noted in favor of defendant to the making of this order.

At a stated term, to wit: The February Term, A. D. 1935, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, California on Saturday the 27th day of July in the year of our Lord one thousand nine hundred and thirty-five.

Present:

The Honorable: WM. P. JAMES, District Judge.

MERCHANTS PACKING CO.,)	
)	
Plaintiff,)	
vs.	)	No. Eq.-702-J
)	
NAT ROGAN, Collector, et al.,)	
)	
Defendants.)	

The facts and law applicable to plaintiff's application for preliminary injunction and the motion to dismiss presented by defendants Rogan and Cohee are like those considered in the Order made this day in The Luer Packing Company, plaintiff, vs. Rogan. For the reasons given in the latter order which are adopted for the purposes of this case, the application for temporary injunction is granted and the motion of the defendants named to dismiss is denied. Security to be furnished in this case as a condition to the issuance of Injunction is fixed at the sum of \$10,000.00 cash, or by an undertaking conditioned as is required in the Luer Packing Company case order. An Exception is noted in favor of defendants. Fifteen days is allowed defendants to answer.

[TITLE OF COURT AND CAUSE.]

PRELIMINARY INJUNCTION.

WHEREAS, in the above entitled cause the verified Bill of Complaint for preliminary injunction and declaratory relief has been filed; and

WHEREAS, the temporary restraining order has been granted; and

WHEREAS, the defendants Nat Rogan, Individually and as Collector of Internal Revenue for the Sixth District of California, E. H. Cohee, Individually and as Acting Collector of Internal Revenue for the Sixth District of California, have appeared and filed their motion to dismiss the bill of complaint filed herein; and

WHEREAS, the matter came on regularly for hearing on said application for preliminary injunction and motion to dismiss on the 11th day of July, 1935, at the hour of ten o'clock a. m. thereof before the above entitled Court, in the courtroom of Judge William P. James; and

WHEREAS, said matter having been argued fully by the plaintiffs through their attorneys, Claude I. Parker and Ralph W. Smith, by J. Everett Blum, and by the appearing defendants through their attorneys, Pierson M. Hall, United States Attorney, and Clyde Thomas, Assistant United States Attorney; and

WHEREAS, it appears from said bill of complaint and from the argument had on said application for preliminary injunction and said motion to dismiss that unless a preliminary injunction is granted herein that immediate and irreparable injury, loss, or damage will be caused to plaintiff and that there will be a multiplicity of suits filed herein and that plaintiff has no speedy, adequate and complete remedy at law; that plaintiff's property rights will be de-

stroyed; that there will be repeated breaches of the peace against the plaintiff and that there will be repeated and continuous acts of trespass upon and against the property of plaintiff by the defendants, and that the defendants or any of them do not have a financial responsibility near equal to the value of the plaintiff's property or the damages which plaintiff will suffer by reason of the attempt to collect said taxes by said defendants; and

WHEREAS, the Court has been fully advised and points and authorities submitted on behalf of both parties hereto and the matter having been submitted to the Court for its decision;

NOW, THEREFORE, it is ORDERED, ADJUDGED AND DECREED that the application for the preliminary injunction prayed for is hereby granted and the motion of the appearing defendants to dismiss is denied.

IT IS FURTHER ORDERED that said preliminary injunction issue and that said appearing defendants, Nat Rogan, Individually and as Collector of Internal Revenue for the Sixth District of California, and E. H. Cohee, Individually and as Acting Collector of Internal Revenue for the Sixth District of California, and their respective agents, servants, attorneys, solicitors and officers, are and each of them hereby is restrained and enjoined from:

(a) Collecting or attempting to collect from plaintiff such or any processing tax, whether by distraint, levy, action at law or in equity;

(b) Imposing or giving notice of intention to impose or causing to be imposed or filed any lien upon the property of plaintiff, whether real or personal; or

(c) In any other manner collecting or attempting to collect said tax.

That this preliminary injunction is based upon the grounds that unless the same is granted that immediate and irreparable injury, loss, or damage will be caused to plaintiff and that there will be a multiplicity of suits filed herein and that plaintiff has no speedy, adequate and complete remedy at law; that plaintiff's property rights will be destroyed; that there will be repeated breaches of the peace against the plaintiff and that there will be repeated and continuous acts of trespass upon and against the property of plaintiff by the defendants, and that the defendants or any of them do not have a financial responsibility near equal to the value of the plaintiff's property or the damages which plaintiff will suffer by reason of the attempt to collect said taxes by said defendants.

It is further ORDERED, ADJUDGED and DECREED that the plaintiff is to furnish security in this case as a condition to the issuance of the injunction in the sum of \$10,000.00 cash or in lieu thereof an undertaking by good and sufficient surety in the sum of \$10,000.00, conditioned upon the payment of all taxes chargeable against the plaintiff herein, together with all costs assessed by the Court, in the event it is finally decided that the injunction is improperly issued or this action is dismissed.

It is further ORDERED, ADJUDGED AND DECREED that the plaintiff continue to file its processing tax returns on the forms provided therefor by the Collector of Internal Revenue with the defendant Collector of Internal Revenue on all hogs processed.

It is further ORDERED, ADJUDGED AND DECREED that the Court reserves the right to require additional security to be given from time to time as may seem necessary to protect the defendants and the Court also

reserves the right to modify this order in any part or particular after notice to the parties.

It is further ORDERED, ADJUDGED AND DECREED that this preliminary injunction remain in force until the final determination of this matter or until further order of the Court.

It is further ORDERED that the defendants shall be and hereby are allowed fifteen (15) days after notice hereof within which to answer the bill of complaint.

It is further ORDERED that an exception is allowed to the defendants with respect to this order.

Dated this 9th day of August, 1935.

Paul J. McCormick

JUDGE OF THE ABOVE ENTITLED COURT

APPROVED AS TO FORM;

CLAUDE I. PARKER AND RALPH W. SMITH,

By J Everett Blum

Attorneys for Plaintiff.

Pierson Hall

PIERSON M. HALL, United States Attorney.

Clyde Thomas

CLYDE THOMAS, Assistant United States Attorney.

Attorneys for Appearing Defendants.

[Endorsed]: Filed Aug 9—1935 R. S. Zimmerman,
Clerk By L. Wayne Thomas Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

AMENDMENT TO COMPLAINT

Comes now the plaintiff and files herein amendments to its complaint as follows, to wit:

I.

That there be added to said complaint a paragraph numbered XVI as follows:

“XVI.

The amount in controversy involved herein is in excess of \$3,000.00. That there is a diversity of citizenship in that the plaintiff is a resident and citizen of the State of California and one of the defendants, Guy T. Helvering, Commissioner of Internal Revenue, is a resident and citizen of Washington, D. C.”

II.

That said complaint be deemed to be amended so as the title of said complaint will read “Bill of Complaint in Injunction and for Declaratory Judgment.”

CLAUDE I. PARKER AND
RALPH W. SMITH,

By J. EVERETT BLUM

Attorneys for Plaintiff.

[Endorsed]: Received copy of the within Amdt to
Compl this 10 day of July 1935 Peirson M. Hall

Filed Jul 11 1935 R. S. Zimmerman, Clerk By Murray
E Wire Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

SECOND AMENDMENT TO COMPLAINT.

Leave of Court first being had and obtained plaintiff herein files this the second Amendment to its complaint and amends its complaint by adding thereto the following paragraph to be known as paragraph "XVIII".

XVIII.

That the plaintiff herein has continuously, during the past several years, operated, maintained and conducted its business in a business-like, workmanlike and efficient manner and that plaintiff has, during the times herein mentioned, continued to so conduct, operate and maintain its business. That prior to the time that said processing tax was levied against plaintiff, plaintiff continuously showed a profit from its pork and packing business. That since the assessing and levying of said processing tax against the plaintiff plaintiff's profit from said pork packing business has been diminishing until at the time of filing plaintiff's complaint herein and for some time prior thereto plaintiff actually showed a loss from the operation of said pork packing business. That said diminishing returns and the loss from said pork packing business is directly, solely and only attributable to the assessment, levy and collection of said processing tax. That plaintiff has been unable to pass said tax on to the retailer or to the consumers of pork and has had to absorb the same and bear the loss therefrom. That plaintiff's profit in the pork business

depends upon volume and that plaintiff has no control of and can not control the consumer market nor the consumer resistance to prices. That plaintiff's overhead and the slaughtering and processing of hogs and pork is substantially a fixed overhead expense. That upon a reduction in the volume of hogs slaughtered there is not a corresponding reduction of operating expense, but that upon a reduction of hogs slaughtered there is a reduction in volume of pork sold and, consequently, a reduction in receipts therefrom. That solely by reason of said processing tax and not otherwise plaintiff has been forced to reduce the number of hogs slaughtered by reason of the Agricultural Adjustment Act affecting the price market of such hogs and the consequent reduction of retail sales and the consequent reduction of sales by plaintiff to retailers. That such reduction in sales by plaintiff has reduced the volume of sales to such extent that plaintiff for many months prior to the filing of its complaint herein has been operating its pork packing business at a loss, as aforesaid.

That plaintiff can not control the cost of the hogs which it is forced to purchase in the operating of its pork packing business. That said price of hogs being such that plaintiff can not control the same has materially increased plaintiff's cost of operation and consequently, plaintiff's prices to its retailers have had to be increased in accordance therewith, thereby resulting in a reduced consumer market. That since, as aforesaid, plaintiff must and does depend upon volume for its profit the reduction of volume

of sales results in a reduction of profit to plaintiff. That said volume has been so reduced that plaintiff is now operating at a loss and consequently, by reason of said consumer market resistance plaintiff has been unable to pass said tax on to its retailers or to the consumers. That plaintiff's losses are attributable solely and only to said Agricultural Adjustment Act and the processing tax levied thereunder and not in any manner to the manner in which plaintiff conducts, operates and maintains its business.

WHEREFORE, plaintiff prays for the relief prayed for in its complaint.

Claude I. Parker

Ralph W. Smith

J. Everett Blum

Attorneys for Plaintiff.

[Verified.]

[Endorsed]: Filed Sep 6 - 1935 R. S. Zimmerman
Clerk By Robert P Simpson Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

ORDER ALLOWING THE FILING OF SECOND
AMENDMENT TO COMPLAINT

THAT, WHEREAS, the facts alleged in plaintiff's Second Amendment to Complaint were deemed to be before the Court during all stages of the above entitled action, and particularly before the Court upon the motion of the defendants to vacate the Preliminary Injunction theretofore granted, and the Court having considered such facts in the granting of the defendants' motion;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff be and it hereby is allowed to file its Second Amendment to Complaint, with the same force and effect as though the plaintiff's complaint had contained said allegations at the time the Government's motion to vacate plaintiff's preliminary injunction came on for hearing before the Court.

Dated September 6th, 1935.

Paul J. McCormick

JUDGE OF THE ABOVE ENTITLED COURT.

[Endorsed]: Filed Sep 6 1935. R. S. Zimmerman
Clerk By Robert P. Simpson Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

MOTION TO VACATE TEMPORARY
INJUNCTION

TO THE HONORABLE PAUL J. McCORMICK,
JUDGE OF THE ABOVE ENTITLED COURT:

Comes now, Nat Rogan, Collector of Internal Revenue, defendant in the above entitled cause, by Peirson M. Hall, United States Attorney in and for the Southern District of California, and Clyde Thomas, Assistant United States Attorney for said District, his attorneys, and moves the Court, to vacate, set aside and dissolve the preliminary injunction entered in this cause, on the 9th day of August, 1935, upon the following grounds and for the following reasons:

I.

That this Court is without jurisdiction to restrain or enjoin the collection of the taxes herein involved, and described in the Bill of Complaint, because:

1. Section 3224 of the Revised Statutes of the United States prohibits the maintaining in any court of a suit for the purpose of restraining the assessment or collection of a Federal tax.

2. The Bill of Complaint sets forth no facts, which, if true, would entitle complainant to the relief prayed for in a court of equity, or to any injunctive relief pendente lite in this cause.

3. Complainant has a plain, adequate and complete remedy at law.

II.

That upon the basis of all the records, files and proceedings in the above entitled cause, plaintiff is not entitled to any injunctive relief pendente lite.

III.

That since said preliminary injunction was entered, the alleged grounds upon which the same was granted are no longer in existence, in that the Congress has enacted H. R. 8492, entitled, "An Act to Amend the Agricultural Adjustment Act, and for other Purposes," approved which does not contain any provisions denying the right to litigate the legality of processing taxes in actions at law, such as was contained in the bill as originally passed by the House of Representatives, and the basis upon which the injunction herein was granted, but on the contrary said Act makes specific provision for the administrative receipt and consideration of claims for refund of any processing taxes alleged to have been exacted illegally and for suits at law to recover such taxes in the event of administrative rejection of such claims for refund.

IV.

That the plaintiff was guilty of laches in bringing this action in that it paid the processing tax each month for a period of a year and a half prior to the filing of this action without objection or protest or any action whatsoever to stop the collection of said tax, during which time the Government expended or committed itself for a sum in excess of \$1,000,000,000, and the immediate stopping of the collection of said tax by said injunction will greatly embarrass the Government in its financial arrangements in reference thereto, whereas during the same time plain-

tiff, together with all persons similarly situated, has adjusted itself and the conduct of its business to the payment of said tax and is now so conducting its affairs.

V.

That since the preliminary injunction was entered here-in the Circuit Court of Appeals for the Ninth Circuit has denied an injunction pending appeal in cases based on similar causes of action to that set out in plaintiff's bill of complaint and that such decision of the said Circuit Court is binding on this Court, so that it is improper for this Court to allow said temporary injunctions to remain in force and effect.

This motion is based upon all the records, files and proceedings in the above entitled cause.

Dated this 22nd day of August, 1935.

Peirson M. Hall
 PEIRSON M. HALL,
 United States Attorney

Clyde Thomas
 CLYDE THOMAS,

Assistant U. S. Attorney
 Attorneys for Defendant.

[Acknowledgment]: Claude I. Parker. Ralph W. Smith By J. Everett Blum Attys for Pltf.

[Endorsed]: Filed Aug 22 1935 R. S. Zimmerman. Clerk. By B. B. Hansen, Deputy Clerk.

At a stated term, to wit: The February Term, A. D. 1935, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, California on Friday the 30th day of August in the year of our Lord one thousand nine hundred and thirty-five.

Present:

The Honorable: PAUL J. McCORMICK, District Judge.

Merchants Packing Company, a corp.,)	
	Plaintiff,)
	vs.	) No. Eq.-702-J
Nat Rogan, etc.,)	
	Defendant.)

This is a motion to vacate a Temporary Injunction. The Restraining Writ in this suit was issued by one of the judges of this court after hearing an argument before such judge. Similar Injunctions have been granted by each of the judges of this court in equity suits by other complainants who seek to enjoin the collection of processing taxes under the Agricultural Adjustment Act, until the respective suits can be heard and decided on the merits.

In each of such pending suits similar motions to vacate the Injunction pendente lite have been submitted. All have been presented for decision because of the urgency of a ruling in order to preserve the right of appeal within the thirty-day period from the date of the Injunction.

It has been considered proper by the Court, because of the absence of the other judges during the regular August

vacation period of the Court, that all of the Motions to Vacate be disposed of at this time. This order is therefore generally applicable to all the pending suits and a like minute order will be entered in each suit respectively.

An event which should be considered has occurred since the Interlocutory Injunctions were granted: The Ninth Circuit Court of Appeals, in *Fisher Flouring Mills Co. v. Collector, etc.*, decided August 15, 1935, by a divided opinion, in applications for Temporary Injunctions in aid of pending appeals in that Court from the denial of Injunctions by a District Court in the State of Washington in suits like the one at bar, denied the respective appellants such restraint pending appeal.

No principle of judicial administration is more firmly established in the United States than that lower courts must submit to the control of superior judicial tribunals. Notwithstanding the strong dissent by one of the Circuit Judges in the Court of Appeals, it is our plain duty to follow the majority opinion.

Both opinions indicate that the appellate court was establishing a rule intended to control all applications for Temporary Injunctions in equity suits brought in this Circuit where the suitors seek to restrain the collection of processing taxes under the Agricultural Adjustment Act, and such authoritative control requires the granting of the Motion to Vacate the Preliminary Injunction heretofore issued in this suit, and it is so ordered. Exceptions allowed complainant. Dated August 30, 1935.

[TITLE OF COURT AND CAUSE.]

SUPPLEMENTAL COMPLAINT

Comes now the plaintiff, MERCHANTS PACKING COMPANY, a corporation, and leave of Court having been granted to file this its Supplemental Complaint, states and alleges:

I.

That the Senate and the House of Representatives of the Congress of the United States has passed certain amendments to the Agricultural Adjustment Act known as H. R. 8492 and that the President of the United States has signed said enactment and that the said Agricultural Adjustment Act is thereby amended as hereinafter in part stated.

That said act provides in Section 21 (d) (1) of said Amendment that no recovery, recoupment, refund, etc., shall be made or allowed to any taxpayer unless after a claim for refund has been duly filed it shall be established in addition to all other facts required to be established to the satisfaction of the Commissioner of Internal Revenue and the Commissioner shall find and declare of record, after due notice and hearing thereon, that the taxpayer, directly or indirectly, has not passed said tax or any part thereof on to the retailer or consumer or back to the producer, but has in fact absorbed and borne the whole of said tax, before the Commissioner shall al-

low any such claim for refund. That if said Commissioner shall reject said claim the record of the Commissioner shall be certified by him to the Court in which the taxpayer brings action upon his rejected claim for refund and such record so certified shall become and be the evidence of taxpayer's case before such Court.

Section 21 (d) (2) of said Amendment provides in part in substance, that no suit or action shall be maintained for recovery of refund, etc., unless prior to the expiration of six months after the date on which such tax imposed by this title has been finally declared invalid, a claim for refund is filed by the person entitled thereto, and that no suit or proceedings shall be begun before the expiration of one year from the date of filing such claim unless the Commissioner renders a decision thereon within that time.

That the said provisions of the law as it now stands substantially effectively, and for all practical purposes and to all intents, take away from and deny plaintiff any and all remedy at law, for the reason that plaintiff is required at the outset to prove a negative in that plaintiff must prove that said tax has not been passed on or back as in said Section 21 (d) (1) provided. That such proof is not capable of being made to a certainty nor with definiteness, and particularly is such proof uncertain and indefinite in regard to plaintiff's business, to wit, pork processing, for

the reason that the processing tax is levied upon the live weight of the hog at the rate of \$2.25 per cwt.; that not more than 75 per cent of said live hog is usable in the prok processing business, and that said 75 per cent of the live weight of the hog is divided into numerous portions including ham, sausage, bacon, lard, loin, hocks, feet, heads, shoulders, etc. That some of said products are pickled, some are smoked, and others go through sundry other processes, and some are sold fresh. That to allocate the proportional part of the tax so each article would be at the best of an uncertain and indefinite nature and difficult of legal proof. That plaintiff stores said various cuts and portions of said hog until sale thereof is available and different portions are necessarily marketed at different times and at greatly varying prices and that, therefore, tracing the relation of the price paid for each portion of such hog, including the processing tax, and the aggregate price obtainable upon sale of all of said portions of any one particular hog and at such various times and at different market or sales prices so as to prove the absorption or nonabsorption of the said processing tax by plaintiff would be impracticable, uncertain, indefinite, thereby rendering plaintiff's action at law incomplete, inadequate and not as plain, speedy, adequate, full or complete a remedy as equity could grant by way of injunctive relief. That further, an accounting system necessary to trace such costs to the various portions of such hog would of neces-

sity be cumbersome, weighty, costly and difficult to maintain. That such bookkeeping and accounting system would in and of itself be a sufficient bar and hazard to plaintiff's remedy at law because of such cost, inefficiency and cumbersomeness aforesaid.

II.

That each, all and every of the amendments of said Agricultural Adjustment Act embodied in H. R. 8492 and known as the Amendments of August 27, 1935, are and each of them is void, invalid and unconstitutional upon each and every of the grounds set forth in plaintiff's original bill of complaint as reasons and grounds for the invalidity and unconstitutionality of the said Agricultural Adjustment Act prior to the making and taking effect of such amendments.

III.

That since the filing of plaintiff's original Bill of Complaint the taxes for each and every of the months subsequent to the month set forth in plaintiff's original Bill of Complaint, to and including the month of August, 1935, has become due and payable and plaintiff has been threatened with distraint and seizure of his property unless said taxes are paid upon demand of the defendant. That each and every of the things alleged in plaintiff's original complaint as results of any such distraint and seizure or imposition of any liens by defendant will result to plain-

tiff if defendant's threats since the filing of said complaint are carried out and made effective. That each and every of such acts of filing and imposing liens against plaintiff's property or distraining and seizing plaintiff's property will constitute additional, continual trespass against plaintiff and plaintiff's property and will result in various and sundry breaches of the peace, which will result in a multiplicity of suits, for the reason that said tort actions could not be joined together in one action at law and plaintiff would have no adequate, plain, speedy, complete and full remedy at law, as alleged in plaintiff's original bill of complaint.

WHEREFORE, plaintiff prays judgment as set forth in his original bill of complaint and hereby incorporates herein the said prayer of his original complaint by this reference, as fully as if the same were reiterated and restated herein.

CLAUDE I. PARKER AND RALPH W. SMITH,

By J. EVERETT BLUM

Attorneys, Solicitors and Counsel
for Plaintiff.

[Verified.]

[Endorsed]: Received copy of the within.....this
12th day of Sept. 1935. Peirson M. Hall, D. H.

Filed Sept. 13 1935 R. S. Zimmerman, Clerk By B.
B. Hansen, Deputy Clerk.

At a stated term, to wit: The September Term, A. D. 1935, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, California, on Thursday, the 12th day of September, in the year of our Lord one thousand nine hundred and thirty-five.

Present:

The Honorable: PAUL J. McCORMICK, District Judge.

MERCHANTS PACKING CO., a)
corporation,)

Plaintiff,)

- vs -)

NAT ROGAN, Individually and as)
Collector of Internal Revenue for the)
Sixth District of California, E. H.)
COHEE, Individually and as Acting)
Collector of Internal Revenue for the)
Sixth District of California, and)
GUY T. HELVERING, Commis-)
sioner of Internal Revenue,)

Defendants.)

In Equity
No. 702-J

These causes coming on for hearing on (1) Petitions for re-hearing in all of the above matters; and, for hearing on (2) Motions for leave to file Supplemental Bills of Complaint in cases, Nos. 698-H, 708-J, 710-H, and 740-C; George M. Breslin, Esq., appearing for the plaintiffs in cases, Nos. Eq.-698-H and Eq.-708-J; Benjamin W. Shipman, Esq., appears for the plaintiff in case No. Eq.-694-C; W. Torrence Stockman, Esq., appears for the plaintiff in Case No. Eq.-710-H; John C. MacFarland, Esq., appears for the plaintiff in Case, No. Eq.-740-C; and J. E. Blum, Esq., appearing for the plaintiffs in Cases, Nos. Eq.-702-J, Eq.-703-H, and Eq.-719-C; and Philip N. Krasne, Esq., appearing for the plaintiff in Case No. Eq.-737-M, Peirson M. Hall, U. S. Attorney, and Clyde Thomas, Assistant U. S. Attorney, appearing for the respondents, and there being no court reporter;

Now, at the hour of 2:05 o'clock p. m. counsel answer ready in all matters; following which,

George M. Breslin, Esq., makes a statement, and

The Court thereupon orders that Supplemental Bills of Complaint may be filed pursuant to Motions filed therefor, and that objections of the respondents thereto be overruled and exceptions noted.

At the hour of 2:10 o'clock p. m., George M. Breslin, Esq., argues to the Court in support of petitions for re-hearing; after which,

At the hour of 2:30 o'clock p. m. Peirson M. Hall, Esq., argues to the Court in réply thereto.

At the hour of 3:10 o'clock p. m. John C. MacFarland, Esq., makes closing argument in behalf of the plaintiffs; following which

At the hour of 3:15 o'clock p. m., J. E. Blum, Esq., makes a statement.

The Court now renders its oral opinion and orders that each Motion for rehearing be severally denied and exceptions allowed.

Upon Motions of Attorneys Blum and Krasne, it is ordered that Supplemental Bills of Complaint in behalf of their respective clients, subject to the objections of respondents reserved thereto, may be filed.

It is ordered that Supplemental Bills of Complaint in Cases, Nos. Eq.-698-H and Eq.-708-J may be amended by interlineation.

[TITLE OF COURT AND CAUSE.]

PETITION FOR APPEAL

TO THE HONORABLE PAUL McCORMICK, DISTRICT JUDGE OF THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION:

Your petitioner, MERCHANTS PACKING COMPANY, a corporation, plaintiff in the above entitled cause, feeling itself aggrieved by the Order on Motion to Vacate Temporary Injunction entered in the above entitled cause on the 30th day of August, 1935, which order granted defendant's Motion to Vacate plaintiff's preliminary injunction, which said injunction was granted by the above entitled Court on the 9th day of August, 1935, and by reason of the manifest errors which were committed to its prejudice, all of which are more specifically set forth in the Assignment of Errors which is filed herein, hereby prays that appeal from said Order be allowed to the United States Circuit Court of Appeals for the Ninth Circuit and that pursuant thereto citation issue as provided by law and that a transcript of the record, proceedings and papers in this case, duly authenticated, may be sent to said Circuit Court of Appeals, to the end that the errors herein complained of may be corrected. Petitioner respectfully petitions and requests that all proceedings in the said District Court of the United States be *staid* by a supersedeas

and that plaintiff's injunction be continued in force or reinstated pending the appeal herein. That petitioner herein tenders bond in such amount as this Honorable Court may require for the purposes of this appeal.

Dated this 6th day of September, 1935.

Claude I. Parker

Ralph W Smith

J. Everett Blum

Attorneys for Plaintiff and Appellant.

[Endorsed]: Received copy of the within this 13 day of Sept. 1935 Clyde Thomas, Asst. U. S. Atty. Filed Sep 13, 1935 R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED
STATES IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA
CENTRAL DIVISION

MERCHANTS PACKING COM-)		
PANY, a corporation,)		
Plaintiff,)		
vs.)		In Equity
NAT ROGAN, INDIVIDUALLY)		No. 702-J
AND AS COLLECTOR OF IN-)		
TERNAL REVENUE FOR THE)		ASSIGNMENT
SIXTH DISTRICT OF CALI-)		OF
FORNIA, E. H. COHEE, INDI-)		ERRORS
VIDUALLY AND AS ACTING)		
COLLECTOR OF INTERNAL)		
REVENUE FOR THE SIXTH)		
DISTRICT OF CALIFORNIA,)		
and GUY T. HELVERING, COM-)		
MISSIONER OF INTERNAL)		
REVENUE,)		
Defendants.)		
<hr style="width: 50%; margin-left: 0;"/>)		

TO THE HONORABLE JUDGES OF THE
UNITED STATES CIRCUIT COURT OF AP-
PEALS FOR THE NINTH CIRCUIT:

Comes now the plaintiff and appellant, MERCHANTS PACKING COMPANY, a corporation, and files the following assignment of errors upon which it will rely upon its petition for review of the order entered by the above entitled Court, in the above entitled cause, on the 30th day of August, 1935.

I.

That the Court erred in granting defendant's motion to vacate preliminary injunction theretofore granted plaintiff on the 9th day of August, 1935.

II.

That the Court erred in making its Order vacating the said preliminary injunction.

III.

That the Court erred in holding that plaintiff's complaint did not state facts sufficient to justify injunctive relief to plaintiff.

IV.

That the Court erred in holding that the decision rendered by the United States Circuit Court of Appeals for the Ninth Circuit in Fisher Flouring Mills v. Collector, and Consolidated Cases, decided August 15, 1935, was binding upon the above entitled Court irrespective of the facts alleged in plaintiff's complaint herein involved, admitted by the defendant to be true, and which facts are wholly different and unlike the facts involved in the said Fisher Flouring Mills v. Collector, and Consolidated Cases.

V.

That the Court erred in holding that the decision rendered by the United States Circuit Court of Appeals for the Ninth Circuit in Fisher Flouring Mills v. Collector, and Consolidated Cases, necessitated the vacation of the preliminary injunction theretofore granted.

VI.

That the Court erred in holding that plaintiff was not entitled to the preliminary injunction.

VII.

That the Court erred in holding that the plaintiff has a plain, speedy, adequate and complete remedy at law.

VIII.

That the Court erred in holding that the dissolution of the preliminary injunction heretofore granted by the Court will not result in a multiplicity of suits.

IX.

That the Court erred in holding that the dissolution of said preliminary injunction would not result in great and irreparable loss and damage to plaintiff.

X.

That the Court erred in holding that the dissolution of the preliminary injunction would not subject plaintiff and its officers and agents to heavy and extraordinary penalties, both criminally and civilly.

WHEREFORE, plaintiff prays that the said Order be reversed and the Circuit Court of Appeals for the Ninth Circuit render a proper order and decree on the record, and for such other and further relief as to the Court may seem just and proper in the premises.

Claude I. Parker and Ralph W. Smith

CLAUDE I. PARKER AND RALPH W. SMITH,
J. Everett Blum

Solicitors and Counsel for Plaintiff.

[Endorsed]: Received copy of the within this 13 day of Sept. 1935. Clyde Thomas, Asst. U. S. Atty. Filed Sep. 13, 1935. R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

ORDER ALLOWING APPEAL AND FIXING
BOND.

IT IS HEREBY ORDERED that the appeal prayed for and the petition for appeal filed in the above entitled cause be allowed; and

IT IS FURTHER ORDERED AND DIRECTED that any application by plaintiff and appellant for a Supersedeas be made to the Circuit Court of Appeals for the Ninth Circuit, or to a Judge thereof, in the form of an application for an injunction pending appeal and that appellant give a bond on appeal as security for costs, conditioned as required by law, in the sum of \$250.00/100.

Dated this 13th day of September, 1935.

Paul J. McCormick
UNITED STATES DISTRICT JUDGE.

Due service by true copy admitted this 13th day of September, 1935.

Pierson M. Hall
Clyde Thomas
Clyde Thomas

Attorneys for Defendants and Appellees

[Endorsed]: Filed Sep. 13 1935 R. S. Zimmerman
Clerk By Edmund L. Smith, Deputy Clerk.

STATE OF CALIFORNIA)
) SS:
 COUNTY OF LOS ANGELES)

On this 13th day of September, 1935, before me S. M. Smith, a Notary Public, in and for the County and State aforesaid, duly commissioned and sworn, personally appeared W. H. Cantwell and Robert Hecht known to me to be the persons whose names are subscribed to the foregoing instrument as the Attorney-in-Fact and Agent respectively of the Fidelity and Deposit Company of Maryland, and acknowledged to me that they subscribed the name of Fidelity and Deposit Company of Maryland thereto as Principal and their own names as Attorney-in-Fact and Agent, respectively.

[Seal] S. M. Smith
 Notary Public in and for the State of California,
 County of Los Angeles.

My Commission Expires February 18, 1938

Examined and recommended for approval as provided in Rule 28.

By J. Everett Blum
 Attorney

Approved this 16th day of September, 1935.

Paul J. McCormick
 District Judge

[Endorsed]: Filed Sep 16 1935 R. S. Zimmerman,
 Clerk By Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

TO THE CLERK OF THE DISTRICT COURT OF
THE UNITED STATES, IN AND FOR THE
SOUTHERN DISTRICT OF CALIFORNIA,
CENTRAL DIVISION:

You will please prepare and within thirty (30) days from the date of issue of the citation on appeal of the above entitled cause transmit to the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, duly authenticated copies of the following documents:

1. The Complaint filed by the plaintiff.
2. The motion of defendants to dismiss plaintiff's complaint.
3. The objections of the defendants to the granting of a preliminary injunction.
4. The preliminary injunction issued by the Court.
5. Plaintiff's amendment to complaint.
6. Plaintiff's Second Amendment to Complaint.
7. Order allowing plaintiff to file second amendment to complaint.
8. Motion of the defendants to vacate temporary injunction.
9. Minute Order on motion to vacate temporary injunction issued by the Honorable Paul J. McCormick, Judge of the above entitled Court.
10. Petition for appeal.

11. Order allowing appeal and fixing bond, and Admission of service thereof.
12. Cost bond on appeal.
13. Assignment of errors.
14. Citation on appeal.
15. This Praeceptum for transcript of record and notice of filing same.
16. Clerk's certificate and bill of citations.
17. Plaintiff's Supplemental Complaint and Minute Order allowing the filing thereof.

The foregoing to be prepared and duly authenticated and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 13th day of September, 1935.

CLAUDE I PARKER
RALPH W SMITH
J. EVERETT BLUM

Attorneys for Plaintiff.

[Endorsed]: Received copy of the within this 13th day of Sept. 1935. Clyde Thomas, Asst. U. S. Atty. Filed Sep. 13, 1935 R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 63 pages, numbered from 1 to 63, inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; bill of complaint; motion to dismiss; objections to granting of preliminary injunctions; minute order of July 27, 1935, containing memorandum of conclusions of Judge James; minute order of July 27, 1935, granting a temporary injunction; preliminary injunction; amendment to complaint; second amendment to complaint; order allowing filing of second amendment to complaint; motion to vacate temporary injunction; minute order of August 30, 1935, containing memorandum and conclusions of Judge McCormick; supplemental complaint; minute order of September 12, 1935, allowing the filing of the supplemental bill of complaint; petition for appeal; assignment of errors; order allowing appeal; cost bond on appeal, notice of filing praecipe and praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is \$ and that said amount has been paid the printer by the appellant

herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to..... and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this..... day of October, in the year of Our Lord One Thousand Nine Hundred and Thirty-five and of our Independence the One Hundred and Sixtieth.

R. S. ZIMMERMAN,

Clerk of the District Court of the
United States of America, in
and for the Southern District
of California.

By

Deputy.

